



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 15 2010

Kathleen Ann Rockefeller, Treasurer
Lamborn for Congress
PO Box 64107
Colorado Springs, CO 80962

RE: MUR 6038
Lamborn for Congress and
Kathleen Ann Rockefeller, in
her official capacity as
treasurer

Dear Ms. Rockefeller:

On July 18, 2010, the Federal Election Commission notified the Lamborn for Congress Committee ("Committee") and you, in your official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 4, 2010, the Commission found that, on the basis of the information in the complaint, there is no reason to believe Lamborn for Congress and you, in your official capacity as treasurer, violated 2 U.S.C. §§ 441b and 434(b) as to Club for Growth State Action. On April 27, 2010, the Commission dismissed on the basis of prosecutorial discretion the allegations that Lamborn for Congress and you, in your official capacity as treasurer, violated 2 U.S.C. §§ 441b and 434(b) as to Christian Coalition of Colorado. Accordingly, on June 4, 2010, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's decision as to Lamborn for Congress and Club for Growth State Action, is enclosed for your information. A Statement of Reasons providing a basis for the Commission's decision as to Lamborn for Congress and Christian Coalition of Colorado will follow.

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If you have any questions, please contact Joshua Smith, the attorney assigned to this matter at (202) 694-1624.

Sincerely,

A handwritten signature in black ink, appearing to be 'Julie McConnell', written over the printed name.

Julie McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondent: Lamborn for Congress and
Kathleen Ann Rockefeller, in her official capacity as
Treasurer

MUR: 6038

1 **I. INTRODUCTION**

2 This matter arises out of a complaint alleging that Club for Growth State Action
3 ("CFGSA") coordinated its communications with Lamborn for Congress ("Lamborn
4 Committee") by using the same voter list used by the Lamborn campaign to send flyers
5 attacking Doug Lamborn's primary opponents during his 2006 campaign for Colorado's
6 5th Congressional District. The complaint also requests that, based on new information,
7 the Federal Election Commission ("the Commission") reopen MUR 5774, which
8 concerned similar allegations against the same respondents.

9 CFGSA appears to have purchased an unenhanced list containing publicly-
10 available voter data from TDS, and thus this transaction does not appear to have met any
11 of the coordination conduct standards. Therefore, the Commission finds no reason to
12 believe that the Lamborn Committee violated 2 U.S.C §§ 441b and 434(b) by receiving
13 and failing to report prohibited in-kind contributions in the form of coordinated
14 communications from CFGSA.

15 **II. FACTUAL BACKGROUND**

16 **A. 2006 Complaint**

17 Doug Lamborn was a candidate in the open Republican Primary in Colorado's 5th
18 Congressional District, held on August 8, 2006, and won the nomination with 27 percent
19 of the vote. In a complaint filed in 2006, MUR 5774, Robert Gardner alleged that

1 Lamborn's authorized committee obtained the names and addresses of absentee voters
2 from the El Paso County Clerk and Recorder and provided them to CFGSA and Christian
3 Coalition, and that these organizations used the addresses to send mailers to voters
4 attacking two of Lamborn's primary opponents, Jeff Crank and Lionel Rivera, in July
5 2006. The 2006 complaint relied on a series of inferences – that two recipients received
6 the flyers at their work addresses, which they had used to request absentee ballots; that
7 only the Lamborn Committee and four other entities had requested absentee voter data
8 from the county clerk's office; and that the Lamborn Committee and Christian Coalition
9 were closely connected because Jonathan Hotaling, Lamborn's campaign manager, and
10 Mark Hotaling, the Executive Director of Christian Coalition, are brothers – to conclude
11 that CFGSA and Christian Coalition received the addresses from the Lamborn
12 Committee. Because the allegations were speculative, and the respondents provided
13 information sufficient to rebut them, the Commission found no reason to believe that the
14 respondents violated the Act.¹

15 **B. 2008 Complaint**

16 In 2008, a different complainant, Matthew Werner, submitted the instant
17 complaint styled as a "Request to Reopen" MUR 5774. Although this complaint
18 incorporates by reference the information from the 2006 complaint, it also alleges that
19 TDS sold the same voter list to CFGSA through a sub-vendor, Blue Point LLC, which

¹ See MUR 5774 (Lamborn for Congress), First General Counsel's Report dated Nov. 17, 2006, at 4, available at <http://eqs.nictusa.com/eqadocs/00005A19.pdf>, and Certification dated Nov. 27, 2006, available at <http://eqs.nictusa.com/eqadocs/00005A1A.pdf>.

1 used the absentee voter list to send CFGSA mailers criticizing Lamborn's primary
2 opponents for their positions on tax issues.²

3 The list at issue included the names and addresses of registered Republican voters
4 who had requested absentee ballots in El Paso County – the county that accounted for 83
5 percent of voters in the 5th District³ – and identified which voters had returned their
6 absentee ballots.⁴ Many voters in Colorado vote by absentee ballot,⁵ and in the 2006 5th
7 District Republican primary, early and absentee votes accounted for 42.6 percent of all
8 ballots cast.⁶ Lamborn's campaign reportedly targeted absentee voters, using the
9 absentee voter list to call and canvass voters and send multiple direct-mail flyers.⁷

10 Absentee ballots apparently played a determinative role in the election: before absentee
11 votes were counted, Lamborn's opponent, Jeff Crank, was ahead in the vote count, but
12

² See *id.* at ¶¶ 9-13.

³ See Erin Emery, *Absentees Key in Springs: Lamborn Focused 5th District Campaign on Mail-In Ballots*, DENVER POST, Aug. 10, 2006, at B5.

⁴ See *Farina Aff.* at ¶¶ 5, 6.

⁵ See *id.* at ¶ 5; see generally Kirk Johnson, *In Colorado, Voting by Mail Alters both Campaign Strategies*, NY TIMES, Oct. 17, 2008, at A19; John Ingold, *Mail-ins Changing Election Equation: The Number of Ballots Already in Voters' Hands is Forcing an Earlier Start to Campaigning*, DENVER POST, Aug. 10, 2008, at B1; Karen Crummy, *Early Votes Blunt October "Surprises:" In Some States, 50 Percent Cast Ballots before Election Day, Altering Political Parties' Campaign Tactics*, DENVER POST, Oct. 15, 2006, at A1.

⁶ See Emery, *supra* n. 3.

⁷ See *id.*

1 Lamborn won when El Paso County posted the results from its absentee voters.⁸
2 Jonathan Hotaling reportedly commented, "We out-hustled the other campaigns on the
3 absentees, and we won absentees overwhelmingly, 2-to-1 over Jeff Crank. ... Other
4 candidates were out talking to the general populace, but when we knew a voter had a
5 ballot in their hand, we went to them."⁹

6 The complaint centers on the following players and transactions.

7 **PLAYERS**

- 8 • TDS, a political campaign data management firm headquartered in Grand
9 Junction, Colorado, that collects, assembles, and sells voter data information,
10 including donor files, survey data, personal contact information, master voter
11 files, and phone records. The CEO and Chairman of TDS is Tom Bjorklund.¹⁰
- 12 • Jonathan Hotaling, who, at the time of the alleged coordination, was the campaign
13 manager for Lamborn and a board member of TDS.¹¹
- 14 • Liberty Service Corp. (a/k/a Liberty Media), a sub-vendor owned and operated by
15 Jonathan Hotaling.¹² Liberty Service Corp. contracted with Lamborn for
16 Congress during the 2006 election cycle to perform campaign management
17 services, including database management and enhancement, and contracted with
18 TDS to obtain their specialized data management and enhancement services.

⁸ See *id.*; see also Dick Foster and Joe Garner, *Late Surge by Lamborn Stuns Crank: El Paso's Absentees Set Up Race Against Democrat Fawcett*, ROCKY MTN. NEWS, Aug. 9, 2006, at A7 ("[W]hen about 17,000 absentee votes were released... Lamborn immediately went from trailing Crank by 1,500 votes to victory."); Anthony Surace, *Was the Crank/Lamborn Race a Preview of McCain/Obama?*, ROCKY MTN. RIGHT, at <http://rockymountainright.com/?a=node/428> (Oct. 30, 2008) ("As the results from the 2006 Republican primary in CD-5 rolled in on election night[,] Jeff Crank took a decent lead over Doug Lamborn. Crank was ahead of Lamborn in every county including El Paso[,] and every major media outlet in the state declared him the victor. Much to everyone's surprise, El Paso County entered all of the absentee ballots [after] the other votes had been tallied. The electorate had turned so sharply [against] Lamborn in the final days of the election that Crank won the votes on election day and the final days of early voting. Lamborn's lead in the absentee votes cast weeks prior was enough to negate all of Crank's gains.").

⁹ Emery, *supra* n. 3.

¹⁰ See Farina Aff. at ¶ 3; TDS Website, at <http://tacticaldatasolutions.net/contact.html> (last visited Sept. 14, 2009).

¹¹ See Farina Aff. at ¶¶ 3, 8.

¹² See Farina Aff. at ¶ 7; Liberty Service Corp., Articles of Incorporation (Aug. 15, 2000).

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- 1 • CFGSA, a 501(c)(4) organization that serves as the "umbrella group" for Club for
2 Growth's state affiliates.¹³
- 3 • Blue Point LLC, a political consulting firm hired by CFGSA to create, design,
4 print, and mail three anti-tax flyers to absentee voters in El Paso County,
5 Colorado, over the course of four days in July 2006.¹⁴ Christopher Baker is the
6 principal of Blue Point.¹⁵

7 ALLEGED TRANSACTIONS

- 8 • TDS collected data identifying which voters had requested absentee voters and
9 which voters had returned their absentee ballots from Jonathan Hotaling and from
10 county clerks and recorders.¹⁶ TDS then "enhanced" this data using
11 approximately 10-14 different processes and deemed it fit for resale.¹⁷
- 12 • TDS sold the enhanced absentee voter data to Liberty Service Corp., a sub-vendor
13 owned by Jonathan Hotaling that provided media and fundraising consulting to
14 the Lamborn Committee.¹⁸ The Lamborn campaign apparently used this voter list
15 to target absentee voters.¹⁹
- 16 • TDS also sold the absentee voter list to Blue Point, which used it to send CFGSA
17 mail pieces.²⁰ Farina allegedly received a call from a representative of Blue
18 Point, presumably Christopher Baker, and transferred the call to Tom Bjorklund,
19 who later told Farina that the voter data would be used by CFGSA as part of its
20 efforts in the 5th District.²¹ Bjorklund also allegedly informed Farina that

¹³ See Chris Casteel, *Group Funding Lawmaker's Ad*, DAILY OKLAHOMAN, June 24, 2006; see also CFGSA, 2007 Form 990 (Jul. 31, 2008), available at <http://www.guidestar.org/FinDocuments/2007/900/135/2007-900135424-048a645d-90.pdf>.

¹⁴ See MUR 5774, Baker Aff. at ¶¶ 5-7, available at <http://eqs.nictusa.com/eqsdocs/00005A17.pdf>; MUR 5774, Compl. Attach. 2-4, available at <http://eqs.nictusa.com/eqsdocs/00005A0E.pdf>.

¹⁵ See MUR 5774, Baker Aff. at ¶ 2; cf. MUR 5609 (Club for Growth), First General Counsel's Report dated Aug. 5, 2005, at 4, available at <http://eqs.nictusa.com/eqsdocs/00004846.pdf>.

¹⁶ See Farina Aff. at ¶ 6.

¹⁷ See TDS Services, at <http://tacticaldatasolutions.net/services.html> (last visited Sept. 14, 2009).

¹⁸ See Farina Aff. at ¶¶ 7-8; see also Lamborn for Congress, 2006 July Quarterly Report (amended Sept. 25, 2009) (listing \$15,000 disbursement to Liberty Service Corp. for media and fundraising consulting).

¹⁹ See Emory, *supra* n.6; cf. MUR 5774, Complaint at 2 (identifying Lamborn for Congress as a recipient of absentee voter data from the El Paso County Clerk and Recorder); Lamborn for Congress, 2006 Pre-Primary Report (amended Sept. 25, 2009) (listing \$250 disbursement to El Paso County Clerk and Recorder for absentee voter information); Lamborn for Congress, Amended July Quarterly Report (amended Sept. 25, 2009) (listing \$450 disbursement for absentee voter information).

²⁰ See Farina Aff. at ¶¶ 10-13; MUR 5774, Baker Aff. at ¶¶ 7, 8, 10.

²¹ See Farina Aff. at ¶ 10.

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1 Jonathan Hotaling had referred Blue Point to TDS and instructed Farina not to tell
2 anyone about this because it was "a gray area."²²

3 **III. LEGAL ANALYSIS**

4 According to the complaint, CFGSA coordinated with the Lamborn Committee
5 when they used the same voter lists to send flyers attacking Lamborn's opponents in the
6 5th District Republican primary, resulting in prohibited in-kind contributions.
7 See 2 U.S.C. § 441b. Under the Act, an expenditure made by any person "in cooperation,
8 consultation, or concert, with, or at the request or suggestion of" a candidate constitutes
9 an in-kind contribution. See 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a). A
10 communication is coordinated with a candidate or candidate committee when: (1) the
11 communication is paid for by a person other than that candidate, authorized committee or
12 agent thereof; (2) the communication satisfies at least one of the four "content" standards
13 described in 11 C.F.R. § 109.21(c);²³ and (3) the communication satisfies at least one of

²² See *id.* at ¶ 11. This paragraph states, "I referred the caller from Blue Point to Tom Bjorklund. He told me that John Hotaling had referred Blue Point to TDS, and he also told me not to tell anyone about it, because it was, in his words, 'a gray area.'" Although it is unclear from this wording whether "he" refers to the caller from Blue Point or Bjorklund, based on Christopher Baker's affidavit attesting that he had no knowledge that TDS directly or indirectly provided voter lists to the Lamborn campaign, we assume that Bjorklund was the source of this information.

²³ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (*Shays III*) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*). On October 8, 2009, the Commission began a rulemaking to comply with this ruling. See *Notice of Proposed Rulemaking, Coordinated Communications*, 74 Fed. Reg. 53,893 (Oct. 21, 2009).

1 the six "conduct" standards described in 11 C.F.R. § 109.21(d). *See* 11 C.F.R.
2 § 109.21(a).

3 The first and second prongs of the coordination regulations are met. The flyers
4 were paid for by CFGSA, not the Lamborn Committee, *see* 11 C.F.R. § 109.21(a)(1), and
5 the mailings were "public communications" identifying Lamborn's primary opponents,
6 directed to 5th District absentee voters, and sent within 90 or 120 days before the primary
7 election.²⁴ *See* 11 C.F.R. § 109.21(c)(4). Therefore, the only question is whether the
8 alleged activities satisfy any of the conduct standards.

9 A. Publicly Available Source Safe Harbor

10 Before applying the conduct standards, we first examine a threshold issue of
11 whether the voter data was obtained from a "publicly available source," and is thus
12 excluded from the "material involvement," "substantial discussion," "common vendor,"
13 and "former employee" conduct standards. *See* 11 C.F.R. §§ 109.21(d)(2)-(5); *Revised*
14 *Explanation and Justification*, Coordinated Communications, 71 Fed. Reg. 33,190,
15 33,205 (Jun. 8, 2006). Under this safe harbor, a communication that uses public
16 information (e.g., information from newspaper or magazine articles, candidate speeches
17 or interviews, materials on a candidate's website or other publicly available website,
18 transcripts from television shows, and press releases) is not a coordinated communication
19 unless it meets the "request or suggestion" conduct standard. *See Revised E&J*, 71 Fed.
20 Reg. at 33,205. The person paying for the communication bears the burden of showing

²⁴ Effective July 10, 2006, section 109.21(c) requires a "public communication" within 90 days of a House or Senate election, as opposed to the previous 120-day standard. *See Explanation and Justification*, Coordinated Communications, 71 Fed. Reg. 33,190, 33,197-98 (Jul. 10, 2006). It is unclear whether the mailers in this case were distributed before or after the effective date of this change, but the alleged activities appear to have occurred well within either time frame – the July 11, 13, 15, and 18, 2006 dates cited in the complaint were 28 or fewer days before the primary election. *See* Complaint at 2.

1 that the information used in creating, producing, or distributing the communication was
2 obtained from a publicly available source – for example, by demonstrating that media
3 buying strategies regarding a communication were based on information obtained from a
4 television station's public inspection file, and not on private communications with a
5 candidate or political party committee. *See id.*

6 It appears that TDS sells two categories of data to political clients: proprietary
7 data, including survey data, donor files, and personal contact information, and public
8 data, including master voter files from election offices and phone records. TDS's website
9 states that, among other things, it can update public voter lists by comparing addresses to
10 the national change of address database to reduce the number of "bad" addresses;
11 identifying voters who voted in previous elections; and identifying voters who prefer
12 early and absentee voting, allowing campaigns to "use this information to target mailings
13 timed to reach particular voters when they are most likely to be voting."²⁵

14 In this case, however, it appears that Blue Point purchased a commoditized list
15 containing information about Republican primary voters who had requested absentee
16 ballots in El Paso County, not a specially packaged list, and that Blue Point did not ask
17 for advice from TDS as to the type of list to use or how best to use the list. Because the
18 available information suggests that CFGSA purchased unenhanced absentee voter data
19 from TDS, the publicly available source safe harbor appears to apply.

20 **B. Conduct Standards**

21 Even if the publicly available safe harbor does not apply, it appears that CFGSA
22 did not engage in coordination with the Committee. While Farina's affidavit asserts that

²⁵ TDS Website, at <http://tacticaldatasolutions.net/services.html> (last visited Dec. 4, 2009).

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1 TDS sold the same voter list to Blue Point for CFGSA's direct-mail efforts in the 5th
2 District, it does not allege that Blue Point or CFGSA requested the same voter list used
3 by the Lamborn Committee or received this voter list in response to a suggestion by
4 Jonathan Hotaling.²⁶ Moreover, available information suggests that the voter list
5 requested and received by Blue Point was not specially packaged; that Jonathan Hotaling
6 was not informed of the reason for requesting the voter list or CFGSA's projects, plans,
7 activities or needs; that Hotaling did not discuss the plans, projects, activities, or needs of
8 the Lamborn campaign or list vendors for a particular Congressional District or area in
9 Colorado; and that CFGSA took steps to avoid employing vendors used by the Lamborn
10 campaign.²⁷

11 Even if Farina's affidavit is true, brief and vague discussions about a voter list do
12 not constitute "substantial discussions" about Lamborn's plans, projects, activities or
13 needs, or establish that the CFGSA's flyers were created, produced, or distributed after
14 such discussions. Cf. MUR 5887 (RMSP PAC), Factual and Legal Analysis (possible
15 substantial discussions where candidate's campaign manager reportedly "hounded" third
16 party and "kept telling" the third party to get ads on the air). Nor is the alleged conduct
17 sufficient to meet the "request or suggestion," "material involvement," or "common
18 vendor" conduct standards. Thus, the available facts do not establish that this transaction
19 met any of the conduct standards in 11 C.F.R. § 109.21(a).

²⁶ See Farina Aff. ¶¶ 9-13 (discussing sale of list to CFGSA).

²⁷ See generally MUR 5774, Baker Aff. at ¶¶ 5-16.

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1 **IV. CONCLUSION**

2 Based on the foregoing, the Commission finds no reason to believe that Lamborn
3 for Congress and Kathleen Ann Rockefeller, in her official capacity as Treasurer, violated
4 2 U.S.C §§ 441b and 434(b).

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